IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-6587

CLIFFORD HERRING,

Appellant,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF FOR RESPONDENT

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Statement of Facts

Appellant was charged with attempted robbery in the first and third degrees and possession of a dangerous instrument in a three count indictment.

I. The Trial

On February 3, 4 and 7, 1972, a trial was held before the Hon. Theodore G. Barlow sitting without a jury.

A. The People's Case

Allen Braxton, the complaining witness, testified that appellant had attempted to rob him on September 15, 1971 behind Braxton's home at 7 Markham Drive, part of a Housing Authority Development on Staten Island.

On that date, Braxton had come home from work and gone into the house at about 5:30 p.m. Five or ten minutes later after greeting his mother and William Stubbs, a family friend and at that time a Housing Authority Patrolman, he went out. After he had walked up the block and returned to the rear of his house, Braxton decided to transfer the eleven dollars in his front pants pocket to his wallet because he "didn't want to lose it."

As he was standing alone behind his house, with the money in his hand, he claimed appellant approached him and said in a soft voice "Please give me some money, I am sick." Appellant, whom Braxton had known previously was wearing a suit and did not look sick.

Braxton testified that when he refused to give appellant the money, appellant took a knife out of his pocket and tried to cut him. Had Braxton not moved away, he would have been cut. He turned and ran into his house, not looking to see where appellant went. Braxton estimated that he had been standing behind his house about three minutes before appellant approached him and that the encounter with appellant lasted about a half a minute.

Inside his house, Braxton put the money back in his pocket and discovered that Stubbs was no longer there. When he found the patrolman in a house up the street, they began looking for appellant. According to Braxton, Stubbs called a police station and some policeman came to one of the housing projects a few blocks away. As

Braxton and Stubbs were walking to this project, at about 6:45 p.m. they saw appellant and approached him. A search of his person revealed the blade of a knife. "After a while", appellant voluntarily accompanied them to the Housing Authority's police office. Appellant was not handcuffed.

Later that night, Braxton went to the police station where he heard appellant say he was innocent and that he had been working at the time he was accused of having swung the knife.

Although Braxton denied being a heroin addict and stated that on September 15, 1971, the day of the alleged robbery he had not used any drugs, he admitted that he had been using heroin during August, 1971. He also admitted that one week after the incident he quit his job. He stated that he was eighteen years old and had had ten years of schooling. He had been sworn into the Marines the day before trial.

William Stubbs, the arresting officer, testified that he had known both appellant and Braxton prior to September 15, 1971. At about 5:00 p.m. he had been in the Braxton home keeping watch on one of the project buildings which had a large drug traffic. He did not recall seeing Braxton there before he left a little after five to keep watch from another house.

At about twenty minutes to six, Stubbs left the area and when he returned, shortly after six o'clock, he saw the complainant. After they spoke, they began to look for appellant. First, they checked all of the "Markham Homes" which took about 20 or 25 minutes. Then Stubbs went to the police room to notify his brother officer to keep a lookout for appellant.

After this, Stubbs left Braxton and patrolled the area by himself. About an hour later, he saw Braxton and

appellant on opposite sides of one of the neighborhood streets. When Stubbs approached, appellant informed him that he had been looking for him because he had heard the patrolman wanted to see him. Stubbs then informed appellant of Braxton's accusation of attempted robbery and appellant denied it stating that he could not have done it.

Appellant agreed to accompany Stubbs to the police office where he was arrested and then searched. Stubbs found a small knife blade which was introduced into evidence over objection.

Appellant informed Stubbs that he had been working for Mr. Taylor on Campbell Avenue. Stubbs contacted Taylor the next morning and testified that Taylor had said appellant had been working for him at 6:00 p.m. on September 15, 1971.

At the end of the People's case, the court dismissed the charge of possession of a dangerous instrument on the grounds that the little blade introduced into evidence did not come within the purview of the statute.

B. The Defense

Donald Taylor, the President of A & A Tank Cleaning Company at 116 Campbell Avenue on Staten Island testified that he employed appellant as a truck helper. He stated that at about 6:00 p.m. on September 15, 1971, appellant was at work. Taylor was unable to swear to the exact time he had seen appellant on his premises that day because it was not his policy to keep his employees under constant observation. However, he did remember seeing him there at about 5:30 or 6:00 p.m. on September 15, 1971.

Taylor stated that on that day he left his company at about 9:00 or 9:30 p.m. and gone home. He had only been home an hour when appellant called saying that he had been arrested.

Appellant testified that he did not approach Braxton and ask him for money. He had been working on a refrigerator in Mr. Taylor's shop until at least 6:30. Stubbs arrested him between 7:30 and 8:00, just after Mr. Taylor had "dropped him off" after work.

Appellant stated that he knew Braxton as a small boy and had also lived next door to him for a few months when appellant stayed with his parents at 9 Markham Drive. He stated that it was about a ten minute walk from Taylor's company to Braxton's house. Appellant also knew that Braxton had been on drugs. He stated that Braxton occasionally had asked appellant for money for drugs or wine and that appellant generally refused and told him to get work. On some of the occasions Braxton had threatened to "fix" appellant.

Appellant admitted that he had used drugs at one time and that in 1970 he had been twice convicted of petit larceny and once of possession of a hypodermic instrument. He stated that he was in the army from 1951 until 1955 when he was honorably discharged.

C. The Verdict

At the end of the defense case, counsel moved to dismiss the two remaining counts of the indictment on the grounds that the People had not made out a prima facie case and had failed to prove appellant's guilt beyond a reasonable doubt. Both motions were denied after which counsel asked:

"Well, can I be heard somewhat on the facts".

and the Court responded:

> "Under the new statute, summation is discretionary, and I choose not to hear summations."

After eight minutes of deliberation, the court found appellant guilty of attempted robbery in the third degree and acquitted the appellant of the count of attempted robbery in the first degree.

II. Sentence

On June 15, 1972, appellant was in court for sentencing. The prosecutor recommended the maximum term because he said appellant had a "long extensive criminal record". Appellant's attorney requested leniency and reminded the court of the sharp issues of fact at trial.

Appellant was sentenced to a maximum of four years imprisonment and is presently on parole. His conviction was affirmed in the state courts. The Supreme Court of the United States noted probable jurisdiction on October 21, 1974.

POINT I

Section 320.20 (3) (c) of the Criminal Procedure Law is constitutional and the trial court's refusal to hear summations in this case was proper.

I.

New York State is the only state with a statute of this kind. Undoubtedly there are cases in other jurisdictions in which the denial of a right to sum up constitutes reversible error. The appellant has cited a number of them.

But none of these cited cases appear to have the express statutory groundwork of New York. In the cases cited there is no statute at all and there is only a so called implied right to make an argument. In New York the defendant who waives a jury trial is on notice that he may have to surrender the right of summation. Having accepted the non-jury trial he takes it with all of its ramifications. The waiver of the jury trial was in writing executed by the appellant and in open court pursuant to statute (Criminal Procedure Law Section 320.10(2)).

There are moreover many cases in which courts have ruled that the denial of closing argument in a non-jury trial does not constitute reversible error.

In *People* v. *Manske,* 77 N E 2d 164 at 170, 399 Ill. 132 (1948) the Supreme Court of Illinois stated,

> "(12) It is also claimed that the trial court committed reversible error in declining to hear argument after the evidence was concluded. As a general rule, in a trial by the court without a jury, we are of the opinion that it is advisable in most instances for the court to listen to argument of counsel, even though it does not appear to be helpful to the court. The testimony was all taken in the presence of the trial judge; he had the opportunity to see and to hear the witnesses, and to observe the attitude and manner of testimony of the defendant. He could observe wherein he was contradicting his statements in court with those made to the officers, and could more properly judge the weight to be given the same than could we. It was perfectly natural for the defendant, after the body of the deceased was discovered, and the evidence of the bruises found upon her body, to soften as much as possible the description of the assaults, which he admits were committed.

(13) We are of the opinion that the argument of counsel in this particular case would not have aided the court very much. The same point was made in People v. Berger, 288 Ill. 47, 119 N.E. 975, and there the distinction was made between arguments before a court without a jury, and it was held argument to a jury was matter of right, but argument before a court, alone, was largely a matter of sound discretion of the trial judge. In this particular case the court believed the evidence sufficient to convict the defendant of manslaughter, and after so announcing told his counsel he would be heard upon the question of punishment, but declined to hear any argument upon the guilt of the defendant.

We are thoroughly satisfied of the guilt of the defendant beyond a reasonable doubt, and do not believe that the defendant was prejudiced in any way by the court declining to hear argument upon the merits of the cause."

The court exercised reasonable discretion in this case in not hearing summations. The case was a simple one. Only two people were present according to the victim. The defense was alibi but the alibi witness was vague about the time he saw the appellant. And of course the alibi location was in fact close to the scene of the crime. In the course of the trial the judge dismissed two of three charges.

In *West* v. *United States*, 399 F. 2d 467, 470 (5th Cir., 1968), cert. denied 393 U. S. 1102 (1969), it was held that in a non-jury trial conducted pursuant to the Federal Juvenile Delinquency Act a trial court has the right to preclude a closing argument. It is clear that proceedings against juveniles receive the basic constitutional protec-

tions. The juvenile is entitled to an attorney to protect his rights and to the right of confrontation and cross examination (*Kent* v. *United States,* 383 U. S. 541). He may not be adjudged a delinquent unless the proof is beyond a reasonable doubt. (*Matter of Winship,* 397 U. S. 358). Confessions taken in violation of his constitutional rights may not be introduced against him. (*Matter of Gault,* 387 U. S. 1, 55). In short, at the same time that this Court was strengthening and clarifying the rights of juveniles concerning their vital constitutional rights, by denying certiorari in *West* v. *United States supra,* it was stating, in effect, that where the case is tried without a jury that the judge may decline to hear summations. Summations in such cases are not such a critical step in the fact finding process so that denial of summation can be said to be violation of due process.

This question of the right to summarize should be left to the sound discretion of the trial court. In many instances hearings held prior to trial concerning, for example, searches and seizures, confessions or admissions, or wire taps and their supporting orders may be of greater significance than the trial itself insofar as the final disposition of the case. But respondent is unaware of any case which holds that the denial of argument is a denial of due process.

II.

Constitutional rights may be waived. For example in *Patton* v. *United States,* 281 U.S. 276, 305 the Court held in a case where the defendant consented to proceed with eleven jurors as a result of the illness of the twelfth and was convicted.

"See also *State* v. *Sackett,* 39 Minn. 69, where the court concludes its discussion of the subject by saying (p. 72):

> 'The wise and beneficent provisions found in the constitution and statutes, designed for the welfare and protection of the accused, may be waived, in matters of form and substance, when jurisdiction has been acquired, and within such limits as the trial court, exercising a sound discretion in behalf of those before it, may permit. The defendants, having formally waived a juror, and stipulated to try their case with 11, cannot now claim that there was a fatal irregularity in their trial.'"

In *Smith* v. *United States,* 360 U. S. 1, 9 the right of a defendant to waive the constitutional right of indictment pursuant to the Federal Rules of Criminal Procedure was recognized:

> "The use of indictments in all cases warranting serious punishment was the rule at common law. *Ex parte Wilson,* 114 U. S. 417; *Mackin* v. *United States,* 117 U. S. 348. The Fifth Amendment made the rule mandatory in federal prosecutions in recognition of the fact that the intervention of a grand jury was a substantial safeguard against oppressive and arbitrary proceedings. *Ex parte Bain,* 121 U. S. 1; *Hale* v. *Henkel,* 201 U. S. 43; *Toth* v. *Quarles,* 350 U. S. 11, 16. Rule 7(a) recognizes that this safeguard may be waived, but only in those proceedings which are noncapital."

In *Singer* v. *United States,* 380 U. S. 24 at pages 34 and 35 the Court stated:

"Thus, there is no federally recognized right to a criminal trial before a judge sitting alone, but a defendant can, as was held in *Patton*, in some instances waive his right to a trial by jury. The question remains whether the effectiveness of this waiver can be conditioned upon the consent of the prosecuting attorney and the trial judge.

The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right. For example, although a defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial, see *United States* v. *Kobli*, 172 F. 2d 919, 924 (C. A. 3d Cir. 1949) (by implication); although he can waive his right to be tried in the State and district where the crime was committed, he cannot in all cases compel transfer of the case to another district, see *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U. S. 240, 245; *Kersten* v. *United States*, 161 F. 2d 337, 339 (C. A. 10th Cir. 1947), cert. denied 331 U. S. 851; and although he can waive his right to be confronted by the witnesses against him, it has never been seriously suggested that he can thereby compel the Government to try the case by stipulation. Moreover, it has long been accepted that the waiver of constitutional rights can be subjected to reasonable procedural regulations: Rule 7 (b) of the Federal Rules of Criminal Procedure sets forth the procedure to be followed for waiver of the right to be prosecuted by indictment; Rule 20 describes the procedure for waiver of the right to be tried in the district in which an indictment or information is pending against a defendant; and Rule 44 deals with the waiver of the right to counsel."

Even such a deep seated right of a defendant not to be twice put in jeopardy for the same offense can be waived by failure to assert it (*Grogan* v. *United States*, 394 F. 2d 287).

We can deduce from these cases that if a person has no federally recognized right to a trial before a Judge sitting alone that he cannot engraft upon such a trial the procedures of a jury trial.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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